THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the U.S. District Court for the District of Oregon
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Workers' Compensation

Plaintiff sued the third-party administrator of her employer's workers' compensation insurance carrier for a "deliberate intention to injure" under ORS 656.156 and intentional infliction of emotional distress ("IIED"). Plaintiff alleged that defendants' agents deliberately concealed from the Administrative Law Judge handling her worker's compensation claim the existence of a videotape and recorded statement supporting her claim of a work-related injury. Defendants' attorney, who was unaware of the existence of the videotape and recorded statement, successfully argued for a reset of the initial hearing date. After the hearing was reset and plaintiff rejected a lowball settlement offer, the videotape resurfaced and the insurer accepted plaintiff's claim.

Judge Stewart dismissed plaintiff's "deliberate injury" claim on the basis that ORS 656.156(2) applies only to injuries caused by "the deliberate intention of the *employer*." Because plaintiff was not suing her employer, the exception was inapplicable.

Judge Stewart also dismissed plaintiff's IIED claim finding the act of seeking a postponement of a workers' compensation hearing from a neutral decision-maker neither outrageous nor extreme enough to support an IIED claim.
Pittman v. The Travelers Indemnity Co., et al.,
CV 06-147-ST
(Opinion, June 7, 2006)
Plaintiff's Counsel: Rex Smith
Defense Counsel: Michael Seidl

Standing

Owens-Corning allegedly began building a polystyrene foam insulation manufacturing facility in Gresham, Oregon, with the potential to emit over 250 tons a year of a potent greenhouse gas, without first obtaining a pre-construction permit required by the Clean Air Act. Several local environmental groups brought suit, seeking an injunction and civil penalties. Owens-Corning moved to dismiss for lack of standing.

Judge Jelderks denied the motion, rejecting Owens-Cornings' arguments (1) that the harm from global warming would be so widespread that Plaintiffs' injuries amounted to mere generalized grievances that are not actionable, (2) that the harm is not "imminent" because the disputed permit was required to construct the plant rather than operate it, and (3) that the harm was not fairly traceable to Owens-Cornings' actions, and was not likely to be redressed by a favorable decision, as there are many other sources of greenhouse gas emissions.

Owens-Corning also argued that the penalty for constructing the plant without a required Clean Air Act pre-construction permit was limited to a single day's civil penalties. Judge Jelderks rejected that argument, observing that this interpretation was inconsistent with the language of the statute and would allow companies to ignore the permit requirement and treat the resulting penalty as a business expense. Judge Jelderks concluded that, at a minimum, Owens-Corning could (if the Plaintiff prevailed) be liable for civil penalties on each day that construction work

was performed without a permit.
Northwest Environmental Defense Center v. Owen-Cornings Corp., CV 04-1727-JE (Opinion, June 8, 2006)
Plaintiffs' Counsel: Melissa Ann Powers, Allison Michelle LaPlante
Defense Counsel: Lynne M. Paretchan, Thomas E. Lindley, Jeffrey C. Dobbins

Employment

In this disability discrimination case, plaintiff takes several medications, including narcotics, to combat his chronic pain. Plaintiff is employed in a position with a sewerage agency which is classified by OSHA as "safety-sensitive" and which involves the operation of equipment, working in areas of heavy traffic, and working over open manholes. When the employer discovered plaintiff's narcotic use, as a result of plaintiff's request to switch to medical marijuana to relieve the pain and the employer's resulting request for a medical opinion about any effect of marijuana use on plaintiff's ability to perform his job, the employer had plaintiff evaluated by an independent medical examiner regarding his ability to perform his job while taking the narcotic medication. When the physician who evaluated plaintiff recommended that he not be placed in a safety-sensitive job while using the narcotics, defendant offered to have plaintiff go through a drug treatment program designed to explore other methods of addressing plaintiff's pain. When plaintiff refused, defendant terminated his employment. Plaintiff brought claims under the ADA, alleging that he was able to perform the essential functions of his position with reasonable accommodation. Judge Hubel recommended that defendant's summary judgment motion be granted based on the threshold issue of whether plaintiff was disabled under the ADA. He concluded that plaintiff failed to create an issue of fact as to whether he was actually substantially limited in the major life activities of walking, lifting, self-care, or working.
Dvorak v. Clean Water Services
CV 04-1384-HU
(F&R, March 20, 2006, adopted May 26, 2006).
Plaintiff's Counsel: Craig Crispin
Defense Counsel: David Wilson

Remand

Plaintiff brought this medical malpractice case in state court under state common law theories of negligence against defendants in connection with the provision of surgical care to a young boy in February 1999. Defendants filed a Notice of Removal asserting that plaintiff's claims were preempted under the Employee Retirement Income Security Act (ERISA).

Defendants argued that plaintiff's claims were not limited to malpractice claims, but included claims challenging the administrative decisions of the defendants.

Judge Aiken disagreed and held that plaintiff's complaint did not challenge her ERISA welfare plan's failure to provide benefits due under the plan, nor did plaintiff ask the court to enforce her rights under the terms of her plan or to clarify her right to future benefits. Thus, the court granted plaintiff's motion to remand the case to state court.
McClellan v. Patel et al.,
CV 06-392-AA
(Opinion, July 17, 2006)
Plaintiff's Counsel: David Miller
Defense Counsel: John Hart, Donald Bowerman

Correction: (from June 6, 2006) In the jury trial, Galdamez v. Potter, CV 00-1768-PK, plaintiff's counsel was Tom Spaulding. (Verdict, May 30, 2006).